

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

1RX
76-7054

To be argued by:
DON ALLEN RESNIKOFF

In The
United States Court of Appeals
For The Second Circuit

STATEN ISLAND SUPPLY COMPANY, INC.,

Plaintiff-Appellee.

vs.

**A.O. SMITH CORPORATION, EQUIPMENT
DISTRIBUTORS CORP. and BROOKLYN UNION GAS
COMPANY,**

Defendants,

A.O. SMITH CORPORATION,

Defendant-Appellant.

*On Appeal From the United States District Court For the
Eastern District of New York*

BRIEF FOR APPELLANT

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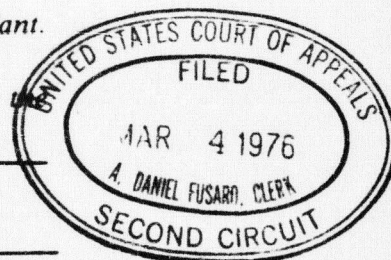


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Plaintiff-Appellee,

v.

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DISTRIBUTORS CORP. and BROOKLYN
UNION GAS COMPANY,

Defendants,

A. O. SMITH CORPORATION,
Defendant-Appellant.

BRIEF FOR APPELLANT

Statement of Issues

This appeal by defendant-appellant, A. O. Smith Corporation ("Smith") from the order of the United States District Court for the Eastern District of New York (A222), presents the following issues for review:

(1)(a) Did the District Court improperly fail to consider relevant and un rebutted facts presented by defendant-appellant Smith in support of its application to dissolve the pending

preliminary injunction and for other relief;
(b) did the District Court take into consideration matters not relevant and prejudicial to the application of defendant-appellant Smith?

(2) Did the District Court apply the appropriate principles of law and equity in considering Smith's application to dissolve the pending preliminary injunction and for other relief?

Statement of Case

This is an action brought by plaintiff-appellee, Staten Island Supply Company, Inc., a New York corporation engaged in sale of plumbing supplies and various other items at retail and wholesale, against three defendants, including defendant-appellant A. O. Smith Corporation. Smith is a New York corporation which has principal offices for the conduct of business in Milwaukee, Wisconsin, and which manufactures water heaters, boilers, and related plumbing equipment.

As set out in its complaint, plaintiff seeks to recover treble damages against Smith for alleged violations of 15 U.S.C. §§ 2, 13 and 14. Plaintiff also seeks a

permanent injunction enjoining defendant Smith from refusing to deal with plaintiff as a distributor of products manufactured by Smith (A2). Smith has interposed an answer denying the essential allegations of plaintiff's complaint, and affirmatively alleging, inter alia, that Smith's termination of plaintiff as distributor was because of plaintiff's business failings.(A9).

Plaintiff moved for and obtained a temporary restraining order on March 31, 1975, enjoining defendant Smith from refusing to sell to plaintiff. Thereafter, on plaintiff's motion, and after a hearing, the Honorable Thomas C. Platt, D.J., entered an order of preliminary injunction dated May 1, 1975, enjoining defendant from refusing to sell to plaintiff, and imposing certain requirements of performance on plaintiff.

By order to show cause returnable September 19, 1975, defendant-appellant Smith moved to dissolve the preliminary injunction on the grounds, inter alia, of:

1. Plaintiff's public villification of Smith employees during the period of preliminary injunction.

2. Plaintiff's submission to Smith of falsified business records concerning Smith's product warranties during the period of preliminary injunction.

3. Plaintiff's refusal to pay certain service costs, and taking of certain improper deductions from amounts due Smith during the period of preliminary injunction.

4. Plaintiff's dilatory tactics in refusing to proceed with discovery.

By memorandum and order dated January 15, 1976 (A222), the Honorable Thomas C. Platt, D.J., refused the application of defendant-appellant Smith to dissolve the preliminary injunction and for other related relief (and at the same time denied Smith's application for sanctions specifically directed at plaintiff's failure to answer interrogatories). Insofar as the memorandum and order of Judge Platt relates to the application of Smith to dissolve the preliminary injunction, and for other related relief, the District Court memorandum and order reads as follows:

"In a seven page report to this Court dated January 1, 1976, Magistrate Catoggio concludes that 'it is my opinion that A. O. Smith has failed in its efforts to show the existence of new facts such as would justify dissolution of the preliminary injunction granted herein under date of May 1, 1975.'

In view of the foregoing and on the basis of the Magistrate's report, defendant Smith's aforesaid motions must be and the same hereby are denied." (A223)

Statement of Facts

The Magistrate's Report, on which the District Court Order appealed from is based, correctly recited that the facts before the District Court on Smith's application to dissolve the preliminary injunction were in the "bound volume of all papers including briefs which earlier had been submitted." The "bound volume" provided to the Magistrate included the following affidavits and documents, indexed and tabbed for the District Court as follows:

Affidavits and documents of defendant Smith:

2. Affidavit of Don Allen Resnikoff sworn to September 4, 1975 (A31). (This affidavit, inter alia, has annexed as Exhibits A and B two letters of plaintiff's Vice President, directed to Smith employees, and showing public villification of Smith employees by plaintiff's Vice President [A39, 41].

Annexed to the affidavit as Exhibit D [A45] is a letter of defendant Smith to plaintiff specifying false warranty reports filed by plaintiff, which falsifications are admitted in the letter of plaintiff annexed to the affidavit as Exhibit B.)

4. Document for Filing dated September 8, 1975 (A47). (The document is a letter of counsel for defendant Smith to counsel for plaintiff restating Smith's policy on warranty service.)

5. Affidavit in Support of Order to Show Cause of Paul Toth sworn to September 10, 1975 (A50). (The affidavit, by an employee of defendant Smith, supports the statements of counsel's affidavit indexed and tabbed for the District Court as item 2 (A31) concerning plaintiff's villification of Smith employees, and discusses certain improper deductions taken by plaintiff from amounts owed by plaintiff to Smith during the period of preliminary injunction.)

6. Affidavit in Support of Order to Show Cause of Daniel V. Hall sworn to September 11, 1975 (A91). (The affidavit, by an employee of defendant Smith, supports

the statements of counsel's affidavit indexed and tabbed for the District Court as item 2 (A31) concerning villification of Smith employees and false warranty reports of plaintiff to defendant during the period of preliminary injunction, and discusses additional similar incidents.)

11. Reply Affidavit in Support of Order to Show Cause of Paul Toth sworn to September 23, 1975 (A184). (The affidavit, by an employee of defendant Smith, expresses the affiant's reaction to the personal villification of him by plaintiff's Vice President, and also states the continuing failure of plaintiff to adhere to Smith policies on such matters as quantity discounts on certain heaters, false warranty reports by plaintiff, and refusal to provide service.)

12. Reply Affidavit in Support of Order to Show Cause of Bernard Gill sworn to September 23, 1975 (A191). (The affidavit, by an employee of defendant Smith, comments on public villification of the affiant by plaintiff's Vice President, and discusses plaintiff's failure to adhere to Smith's terms concerning quantity discounts on certain heaters.)

14. Document for Filing dated September 29, 1975 (A194). (Document includes letter of defendant Smith advising plaintiff of its deficiency in payment of amounts due Smith in the amount of \$2,407.12.)

16. Supplemental Affidavit in Support of Order to Show Cause of Don Allen Resnikoff sworn to November 14, 1975 (A197). (The affidavit, inter alia, has annexed as Exhibit A(1) a writing of plaintiff's Vice President used for a repeated disparagement of Smith employee Paul Toth (A206), and annexes as Exhibit B a letter of plaintiff's counsel admitting plaintiff's distribution of the writing annexed to the affidavit as Exhibit A(2), and repeating statements disparaging of Smith employee Paul Toth (A208). The affidavit also discusses plaintiff's deficiency in payment of amounts due Smith in the amount of \$4,578.91, and has annexed exhibits relevant to the deficiency in payment.)

17. Supplemental Affidavit of Don Allen Resnikoff sworn to January 5, 1976 (A212). (The affidavit, inter alia, annexes as Exhibits A(1), (2) and (3), a letter, with attachments, of a Staten Island customer of plaintiff complaining about plaintiff's warranty replacement of an A. O. Smith unit. The affidavit also has annexed as Exhibit B a false report concerning Smith's

product warranty submitted by plaintiff to Smith and involving the same Staten Island customer, thereby rebutting plaintiff's previous explanation of the purpose of the admittedly false warranty reports of plaintiff to Smith during the period of preliminary injunction.)

18. Document for Filing dated January 5, 1976 (A220). (The document consists of a letter of plaintiff's counsel admitting plaintiff's retail sales of Smith products on Staten Island in excess of the amount stated to be permissible at page 11, numbered paragraph 1) of opinion and order of the Honorable Thomas C. Platt dated May 1, 1975 (A27).

Affidavits of plaintiff:

7. Affidavit in Opposition to Motion of Louis C. Pulvermacher sworn to September 18, 1975 (A157). (The affidavit discusses the status of discovery from plaintiff's point of view.)

8. Affidavit of Robert Schwimer sworn to September 18, 1975 (A142). (Affidavit of Vice President of plaintiff, stating plaintiff's position on plaintiff's taking of certain unauthorized deductions from moneys

owed to Smith by plaintiff. The affidavit offers "apologies for the use of certain words in describing [Smith employees] Messrs. TOTH and GILL," and acknowledges submission of falsified warranty reports to defendant Smith during the period of preliminary injunction. The affidavit does not, of course, address the subsequently occurring villifications of a Smith employee by plaintiff.)

ARGUMENT

POINT I

- A. The District Court improperly failed to consider relevant and un rebutted facts presented by defendant-appellant Smith in support of its application to dissolve the preliminary injunction.

Plaintiff's public disparagement of Smith employees:

The Magistrate's Report (A224), which is the stated basis for the memorandum and order appealed from (A222), includes the following language about public disparagement:

"1. Plaintiff's public disparagement of Smith employees i.e. a single letter called them 'clowns and creeps' and accused them of 'lack of business knowledge.'

This is an isolated occurrence not repeated to my knowledge. Some time ago the plaintiff was cautioned to cease and desist which it has done." (A224)

In so stating, the Magistrate's Report inexplicably ignores Smith's undisputed submissions asserting repeated public disparagement of Smith employees by plaintiff. Smith's assertions of repeated public disparagement are contained in an affidavit sworn to November 14, 1975, and tabbed and indexed for the District Court as item 16 (A197), and annexed exhibits.

The "single letter" of plaintiff referred to in the Magistrate's Report is apparently an erroneous reference to plaintiff's disparaging letters directed to Smith employees and dated August 27, 1975, referred to in the Smith affidavits tabbed and indexed for the District Court as items 2 (A31), 5 (A50), 6 (A91), 11 (A184), 12 (A191), and admitted in the affidavit of plaintiff's Vice President tabbed and indexed for the District Court as item 8 (A142).

The Smith affidavit submitted to the District Court and asserting repeated disparagement (A197) contained, inter alia, the following factual assertions:

"On or about November 5, 1975, Robert Schwimer, Vice President of plaintiff, apparently published to Smith distributors a written statement containing Robert Schwimer's disparaging characterization of Paul Toth of Smith as a 'clown', 'creep', and lacking in business judgment. The vehicle for the publication of Robert Schwimer was, on information and belief, the personal letter of Paul Toth to Robert Schwimer dated November 3, 1975, a copy of which is annexed hereto as Exhibit A(2). Paul Toth's letter to Robert Schwimer restates and comments on the disparaging remarks contained in Robert Schwimer's letters of August 27, 1975 to Dan Hall and Paul Toth [the restatement of disparaging remarks in the Toth letter being included in explanation of Smith's decision not to invite Robert Schwimer to a social gathering of Smith distributors]. Robert Schwimer apparently made copies of Paul Toth's personal letter restating the disparaging words, and mailed it to some Smith distributors with an accompanying 'Dear Distributor' note, a copy of which is annexed hereto as Exhibit A(1).

"Paul Toth's personal letter, directed only to Robert Schwimer, did not publish Robert Schwimer's disparaging remarks against Paul Toth to Smith distributors. Therefore, Robert Schwimer's [November] mailing to Smith distributors was the first publication to the distributors of the disparaging remarks of Robert Schwimer directed against Paul Toth in his capacity as a Smith representative.

"Robert Schwimer's extraordinary publication of disparaging remarks is obviously harmful to Smith. Plaintiff has made it clear, once again, that plaintiff is abusing the Court's preliminary injunction order by using the order as a license to damage A. O. Smith Corporation." (A197-9; Exhibit A(1) is at A206, Exhibit A(2) is at A207)

Exhibit B to the Smith affidavit asserting repeated disparagement is the letter of plaintiff's counsel admitting new publication by plaintiff of disparaging remarks to "three distributors" of Smith products. (A208)

The assertion in the Smith affidavit of repeated disparagement of Smith employees by plaintiff is entirely un rebutted in the record before the District Court.

In short, the Magistrate and the District Court apparently decided to continue the preliminary injunction without considering the Smith assertions of repeated public villification of Smith employees by plaintiff, notwithstanding that (1) the Smith assertions were submitted to the Court by affidavit (A197) complete with copies of the plaintiff's new disparaging correspondence to Smith distributors (A206-7), along with a letter of plaintiff's

counsel admitting publication of the disparagement to Smith distributors (A208), and (2) notwithstanding that the Smith assertions of repeated disparagement were not controverted by plaintiff.

The Magistrate's Report is without foundation in the record before the District Court in its statement that public disparagement of Smith employees is "an isolated occurrence not repeated to my knowledge." (A224)

Submission to Smith of reports concerning Smith's product warranties giving fictitious names and addresses of owners of Smith water heaters:

The Magistrate's Report draws the conclusion that:

"[P]laintiff appears to have been unwilling to give Smith true names and addresses of its customers who made claims under [Smith's] warranties and as Smith says in its brief P.8 'plaintiff does not want the end user to receive Smith's usual follow up communications.'" (A225).

However, the Magistrate's Report also suggests that the problem of falsified warranty submissions by plaintiff to Smith is without consequence, because plaintiff was "advised" to cease falsifying records, during the pendency of the injunction, and because "Smith has not charged that it has been directly defrauded of any money by this practice." (A225)

In fact, the record at several points contains clear and unrebutted statements of actual, direct, consequential, and continuing damage to Smith from plaintiff's falsification of warranty reports. In the affidavit indexed and tabbed for the District Court as item 2 (A31), it is explained that:

"Reasons Smith requires...the correct name and address of end users [in reports of plaintiff concerning Smith's warranties] are that: (1) Smith wishes to protect the consumer by providing the consumer with direct advice of credit paid the distributor and due the consumer [through the distributor] under the Smith warranty and (2) Smith wishes to maintain records from which it can be determined whether any particular heater is within [Smith's] warranty coverage, which is 3 years for commercial users and 10 years for non-commercial." (A35-6)

These reasons have a direct money consequence to Smith which is obvious, and requires no argument.

Surely it is not a subtle point, for example, that honest warranty reports giving true customer names are needed from plaintiff so that Smith can have direct communication with the end user and determine whether warranty credits given by Smith to plaintiff are passed on to a consumer or are being misappropriated. Indeed, without direct communication with the end user Smith cannot determine whether a reported consumer's warranty claim is real or an invention of plaintiff to obtain money under a false pretense.

In the affidavit tabbed and indexed for the District Court as 17 (A 212), it is further stated that:

"The falsification of a warranty report involving the sale of a Smith product on Staten Island and involving an end user whose identity was known to plaintiff demonstrates that there are other reasons for the cover-up engaged in by plaintiff which go far beyond plaintiff's claimed fear of termination for selling outside of Staten Island.

"The use of a falsified consumer name on plaintiff's warranty reports precludes the usual follow up letter of Smith to the consumer, the obvious purpose of the Smith follow up letter being to unearth distributor wrongdoing.

"Does plaintiff frequently impose charges on the consumer for the replacement heater which violate Smith's warranty administration? (See testimony of Paul Toth at preliminary injunction hearing, Transcript, p. 64, line 9 through p. 65, line 12.) Plaintiff's falsification program precludes an answer, except it is clear that plaintiff's warranty falsifications during the preliminary injunction period have the purpose and effect of harming Smith." (A213-4)

Smith's submissions to the District Court omit specification of a dollar value attributable to the damage of plaintiff's false warranty reports. However, the Smith application was not for recovery of a dollar amount, but for equitable relief from the Court's injunction which requires Smith to do business with a distributor which falsifies business reports to Smith, thereby causing very real damage to Smith. Consequently, the statement in the Magistrate's Report that "Smith has not charged that it has been directly defrauded of any money" is both unresponsive to Smith's application for relief, and without substantial foundation in the record.

Plaintiff's objection to payment of service costs as per the "agreement" of plaintiff recited in the District Court's memorandum and order dated May 1, 1975; and plaintiff's taking improper deductions from amounts due Smith:

With regard to "3. Plaintiff's objection to payment of service costs as per [the purported] agreement [of plaintiff] recited in this court's memorandum decision dated May 1, 1975 (P.7) and 4, Plaintiff's taking and retaining improper deductions from amounts due Smith", the conclusion of the Magistrate's Report is that because "On my insistence all payments have been made to Smith in accordance with its charges, albeit 'under protest'" therefore "I see no valid reason for complaint on this score at this time." (A225)

Reasons for "complaint on this score" as found in the record before the District Court include some stated in the affidavit and annexed documents tabbed and indexed for the District Court as item 16 (A197), as follows:

"Plaintiff's payment to Smith due October 15, 1975, was, on information and belief, \$4,578.91 short of the balance of \$29,589.00 called for in Smith's statement dated 9-30-75, a copy of which is annexed hereto as Exhibit C(1). Annexed as Exhibit C(2) is the letter of Smith's Credit Manager dated October 27, 1975 demanding payment.

"The legal issue is whether plaintiff may use the pending preliminary injunction order as a license for avoidance of usual sanctions for non-payment of amounts due Smith. It is respectfully submitted that plaintiff's persistent refusal to pay its bills constitutes abuse of the pending preliminary injunction order....

"Exhibit C(1), Smith's 9-30-75 statement, indicates deficiencies in payment by plaintiff by the code "4", meaning "shortage". The deficiencies in payment shown on the statement, totaling \$4,578.91, consist of the following items marked "4" on the statement, which are set out here in the same order as they appear on the statement:

Invoice or
Credit No.

9538	SISCO's claimed deduction for \$180.00 dates from January 17, 1975, and is for services in Brooklyn-Queens for which plaintiff, not Smith, must pay, and so is not allowed.
9995	On April 17, 1975, SISCO deducted \$270.25 from check #9995 with no explanation. SISCO's deduction, made without explanation, is therefore not allowed.
9995	On April 17, 1975 there is another deduction by SISCO from the same check (9995) for \$270.00 for service work in Brooklyn-Queens for which plaintiff, not Smith, must pay.
7175081270	On July 17, 1975 there is a deduction by SISCO for \$63.50 from invoice #7175081270. That represents an unauthorized 5% discount on commercial water heaters, which has not been allowed.
7175881260	On that same date, July 17, 1975, a similar deduction for \$215.50 was made from invoice #7175081260. That was also for an unauthorized 5% discount on commercial water heaters and has not been allowed.

- 7175144760 On the same date, July 17, 1975, a deduction for \$13.39 was made from invoice #7175144760. That was for the same unauthorized 5% discount on commercial heaters, but Smith was promised that it would be paid in October, which it was not.
- 10525 On October 19, 1975 a deduction for \$609.62 was made from check #10525. That represents an unauthorized 5% discount on KEE water heaters.
- 10525 On the same date and the same check number, a deduction for \$549.53 was made for the return of a BT 365. Credit will be issued against this upon Smith's determination that the heater was in fact defective.
- 10652 On September 19, 1975 a deduction for \$2,407.12 was made on check #10652. That represents an unauthorized 5% discount on KEE heaters." (A201-3)

See also, inter alia, the similar affidavits and documents of Smith tabbed and indexed for the District Court as items 5 (A50, 54-77), 11 (A184, 185-6), and 14 (A194).

It is not necessary to burden this Court with repetition here of the content of Smith's submissions to the District Court, because the record is clear that plaintiff's prolonged refusals to pay Smith during the period of preliminary injunction were in bad faith.

The Magistrate's direction to plaintiff to pay, mentioned in the Magistrate's Report, indicates substantial agreement with the view that plaintiff's refusals to pay were unjustified. The Magistrate's Report properly recites the egregious example of plaintiff's refusal to pay service costs, notwithstanding that the District Court in its Opinion and Order of May 1, 1975, gave credence to plaintiff's disputed testimony that plaintiff "agree[d] to reimburse SMITH for any such servicing costs." (A16, 22), (A224, 225)

It is submitted, however, that there is clear error in the statement of the Magistrate's Report that there is "no valid reason for complaint at this time" (A225). Although plaintiff eventually complied "under protest" with the Magistrate's direction to pay, the bad faith of plaintiff's refusals to pay, and the incident economic and administrative burdens on Smith, remain a relevant and undisputed part of the record, and are not erased by reluctant and belated payments by plaintiff "under protest."

Plaintiff's dilatory tactics in failing to proceed with discovery:

The record before the District Court is bare of any failure or refusal by Smith to expedite discovery. Indeed, as illustrated by the letter of Smith's counsel criticized at page 5 of the Magistrate's Report (A228), Smith repeatedly and formally urged plaintiff to proceed with its discovery efforts, including deposition of Smith employees or officers (A179).

Smith counsel never refused to arrange a deposition of Smith and the Magistrate's stated recollection to the contrary (A226, line 3), is, unfortunately, incorrect, and also without support in the record. (Smith counsel did properly decline to proceed with deposition of plaintiff's officers until plaintiff responded to the Smith interrogatories served in May of 1975.)

Strong criticism of Smith's interrogatories is contained in the Magistrate's Report, and is extraordinary for a number of reasons. Careful interrogatories concerning contentions of plaintiff are clearly

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required because the purposefully skimpy complaint of plaintiff fails to give notice to Smith of the charges of trade restraints against which it must defend. (A2) Plaintiff served no answer of any kind to Smith's interrogatories until approximately eight months after the interrogatories were served, and during that time plaintiff never objected to Smith's interrogatories. (Plaintiff's answer to Smith's October, 1975 motion concerning interrogatories was a promise of prompt compliance in responding to interrogatories.) The answers to interrogatories belatedly served by plaintiff on December 16, 1975, were patently incomplete in many respects, and included refusals to answer entire questions never previously objected to. The illustration from plaintiff's December 16, 1975 response to interrogatories selected in the Magistrate's Report (A226-8) in fact illustrates the bad faith of the response.

Notwithstanding the expressed criticism of Smith's interrogatories in the Magistrate's Report, the Report also apparently reflects the Magistrate's understanding

that plaintiff's December 16, 1975 answers to interrogatories failed to meet the requirements of the Federal Rules of Civil Procedure:

"Plaintiff's attorney, at my urging...agreed to review carefully his answers to Smith's interrogatories and give answers fully and in the most minute and specific detail as required...." (emphasis added) (A229)

It is hardly an indication of the good faith of plaintiff's December 16, 1975 response to interrogatories served upon it in May that plaintiff's response to the Magistrate's urging was service of substantially improved answers to interrogatories.

The preceding detail is offered only because it is necessary to demonstrate that the Magistrate's Report is incorrect and without support in the record insofar as the Report criticizes Smith counsel for seeking answers to interrogatories; and criticizes Smith's counsel for discouraging plaintiff's deposition of Smith, something Smith counsel did not do (and, indeed, could not do if it were desired).

The main points relevant here are simply stated: discovery proceedings have imposed the extraordinary burden of a preliminary injunction on Smith for a period of

about ten months, obviously an overly long period for a preliminary injunction, and the record is bare of any basis for blaming the delay on Smith's counsel. In these circumstances, equitable relief of the kind requested of the District Court by Smith is clearly appropriate, and the refusal of relief of any kind by the District Court is clearly inappropriate. As this Court commented in Levin v. Ruby Trading Corp., 352 F. 2d 508, 509 (2d Cir., 1965):

"[P]rovisional remedies, such as interlocutory injunctions and receiverships, should not be continued indefinitely in favor of a plaintiff who neglects or refuses to bring his action to trial."

- B. The District Court considered matter irrelevant and prejudicial to the application of Smith for relief from the preliminary injunction.

The District Court order appealed from, entered "on the basis of the Magistrate's Report" (A 223), in effect adopts the statements of the Magistrate's Report that:

"Animosity between Smith's employees on the one hand (Toth affidavit tab 11) and officers of the plaintiff on the other (Robert Schwimmer [sic] affidavit tab 8) has spilled over onto counsel so that both make abrasive utterances such as that of Smith's counsel in a letter to me dated September 5, 1975 (attached to reply affidavit of Don Allen Resnikoff - tab 10): 'the court's shotgun marriage of Smith and plaintiff by preliminary injunction is not happy, and ought not to be prolonged.'" (A228-9)

Smith's counsel respectfully takes exception to being characterized as "abrasive." Although perfect deportment is, of course, not claimed, it is submitted that the record before the District Court indicates no pattern of "abrasive" activity by Smith counsel. (The quoted letter of Smith counsel was an attempt to help the Magistrate by outlining issues to be considered at conference. The context of the quoted phrase was the suggestion that discovery proceedings ought to be expedited where there is a burdensome preliminary injunction order outstanding.)

The problem with the ad hominem comments of the Magistrate's Report is the implication that the Magistrate considered positions taken by Smith concerning plaintiff's business behavior to be a reflection of "animosity between Smith's employees...and officers of plaintiff...spilled over onto counsel." Substantial parts of Smith's factual submissions to the District Court were presented by counsel's affidavit. By dwelling on criticism of "abrasiveness" of counsel, the Magistrate's Report conveys the clear impression that decision of substantive issues was influenced by consideration of

irrelevant matter, that is, the Magistrate's consideration of counsel's subjective opinions and style of counsel's presentation concerning the behavior of officers and employees of the parties.

Put flatly, the ad hominem comments in the Magistrate's Report suggest absence of impartial and fair judicial evaluation of Smith's position that continuation of the preliminary injunction imposes an inequitable and unreasonable burden on it. Because the relevant District Court Memorandum and Order was entered "on the basis of the Magistrate's Report," without consequential additional comment, the District Court Memorandum and Order in effect adopts the ad hominem comments of the Magistrate's Report.

POINT II

The District Court failed to apply the appropriate principles of law and equity in considering Smith's application to dissolve the pending preliminary injunction, and for other relief

Because the relevant Memorandum and Order of the District Court is by its terms entered "on the basis of the Magistrate's Report," without substantial discussion,

the Memorandum and Order in effect adopts the case law discussion found on the last page of the Magistrate's Report. That case law discussion is limited to the general statement of principle found in American Optical Co. v. Rayex Corp., 291 F. Supp. 502, 510 (S.D.N.Y., 1967), aff'd 394 F. 2d 155 (2nd Cir.), cert. denied 393 U.S. 835 (1968).

The facts of American Optical are quite different from those at bar. The preliminary injunction in the instant matter requires defendant Smith to deal with a plaintiff distributor which has used the preliminary injunction to harm Smith; American Optical involved a quite different kind of plaintiff who was not in a position to harm defendant during the period of preliminary injunction, and in fact did not. In American Optical the application to dissolve was not made on the basis of facts occurring after entry of the preliminary injunction order; the opposite is true in the instant matter.

It is submitted that where, as in the instant matter, a preliminary injunction mandates continuance of a manufacturer-distributor business relationship,

a defendant's application to dissolve raises considerations of law and equity which are not met by the general statement of legal principle relied on by the District Court. These considerations of law and equity derive from the opportunity which is afforded the distributor-plaintiff which obtains the preliminary injunction to do harm to the manufacturer-defendant.

As suggested by this Court in another context, it is common sense that "the relationship between a manufacturer and his customer should be reasonably harmonious," and that the pendency of litigation between manufacturer and customer indicates a disruption of usual business harmony. House of Materials v. Simplicity Patterns, Inc., 298 F. 2d 867, 871 (2nd Cir., 1962). A District Court which has entered a preliminary injunction mandating continuance of a business relationship between a manufacturer and distributor obviously must be prepared to deal with the possibility of business friction thereby created. See Learned Hand's opinion in Bethlehem Engineering Export Co. v. Christie, 105 F. 2d 933, 935 (2nd Cir., 1931). Where, as in the instant matter, an injunction requires "continuance of the defendant's obligation to the plaintiff; ...[dependent on] plaintiff's continued performance of

its duties under the contract" (Bethlehem Engineering Export Co., *ibid*), an application to dissolve requires District Court consideration of (1) applicable "clean hands" principles, and (2) applicable principles concerning judicial supervision.

"Clean hands":

Where a plaintiff-distributor has obtained a preliminary injunction mandating continuance of a business relationship with a defendant-manufacturer, inequitable conduct by plaintiff during the period of the preliminary injunction properly precludes continuance of the preliminary injunction. As explained in Heldman v. United States Lawn Tennis Ass'n., 354 F. Supp. 1241, 1249 (S.D.N.Y., 1973), "Injunctive relief in advance of trial is available only to the plaintiff...who comes before the Court free of inequitable conduct on its part with respect to the matters in dispute."

There is error in the District Court's failure to address the "clean hands" issues raised by the inequitable conduct of plaintiff which occurred during the period of preliminary injunction.

The un rebutted evidence in the record clearly shows that during the pendency of the preliminary injunction there have been business derelictions of the distributor plaintiff directed against defendant Smith. Consequently, if the District Court had considered ordinary "clean hands" principles, the application of Smith to dissolve the preliminary injunction would have been granted.

Judicial supervision:

Usual "clean hands" principles have particular significance where a plaintiff with unclean hands seeks continuance of a preliminary injunction imposing serious burdens of supervision on the Court.

In the present matter, the District Court entered the preliminary injunction order dated May 1, 1975 on the explicit finding that "Smith on the other hand will in all probability only sustain minimal, if any, harm by a mandated continuance of its relationship with plaintiff."

Also, the Court's order of May 1, 1975 contains specific directions to plaintiff to avoid harm to Smith during the period of preliminary injunction and to preserve the status quo ante. (A27)

It is clear that the preliminary injunction order of Judge Platt was predicated on an expectation of proper business behavior of plaintiff, consistent with preservation of the status quo ante; and it is equally clear on the record that plaintiff has willfully harmed Smith during the period of preliminary injunction and has been guilty of dishonest business practices affecting Smith during the period of preliminary injunction. Plaintiff's actions during the period of preliminary injunction have removed the predicate of the preliminary injunction order. In addition, those actions of plaintiff are of a kind which require "continuous...repeated supervision of a court" of a kind held inappropriate by Judge Hand in Bethlehem Engineering Export Co., supra.

It is submitted that as a matter of principle the District Court should not continue a preliminary injunction properly requiring continuing judicial supervision because of plaintiff's wrongdoing as shown in the record.

The record is clear that the plaintiff has already used the preliminary injunction as a license for inequitable conduct properly requiring policing. To quote Chief Justice Warren Burger's address The State of the Judiciary - 1970 "[W]e must make a choice of priorities." American Bar Association Journal, October, 1970, Volume 56, pages 929, 932-933.

The foregoing discussion is not intended to endorse judicial economy achieved by complete refusal of judicial orders directed against plaintiff's derelictions during pendency of the preliminary injunction. On the contrary, it is submitted that the District Court's refusal of judicial relief of any kind is inconsistent with the supervisory responsibilities of the District Court inherent in a preliminary injunction order mandating a continued business relationship between manufacturer and distributor. Bethlehem Engineering Export Co., supra. "When we want to dance, we must provide musicians," Burger, C.J., supra, at ABA Journal, Volume 56, page 932.

It may be argued that judicial economy would be facilitated if defendant's counsel would not trouble the District Court with problems of plaintiff's inequitable

conduct. The answer is, of course, that a preliminary injunction is an extraordinary equitable remedy which should not be afforded a plaintiff guilty of inequitable conduct, and that an affected defendant's counsel acts properly in drawing the Court's attention to inequitable conduct of plaintiff directed at the defendant. "[T]he antitrust laws do not require a business [defendant] to cut its own throat." Dehydrating Process Co. v. A. O. Smith Corp., 292 F. 2d 653, 655 (1st Cir., 1961).

To summarize, in considering Smith's application to dissolve, the District Court should have applied "clean hands" principles and relevant principles of judicial supervision. Failure to apply these principles of law and equity is error, particularly since the preliminary injunction mandates a business relationship requiring continued proper performance by plaintiff.

POINT III

The Applicable Standard of Appellate Review

A lower court's decision with respect to preliminary injunctive relief may be reversed on appeal where there is an abuse of discretion or a clear mistake

of law, e.g. Exxon Corp. v. City of New York, 480 F. 2d 460, 464 (2nd Cir., 1973), Santos v. Bonanno, 369 F. 2d 369, 370 (2nd Cir., 1966). However, appellate review and reversal of a lower court's decision with respect to preliminary injunctive relief is not limited to those cases in which an abuse of discretion or a clear mistake of law has occurred. In Omega Importing Corp. v. Petri-Kine Camera Co., 451 F. 2d 1190 (2nd Cir., 1971), then Chief Judge Friendly, speaking for this Court, stated:

"[W]e recognize the frequent statements that the discretion of a district judge in refusing or granting a temporary injunction will generally be respected.... Such general statements are less useful in deciding concrete cases than is sometimes thought; often they merely rationalize conclusions already reached.... [C]ongress would scarcely have made orders granting or refusing temporary injunctions an exception to the general requirement of finality as a condition to appealability, 28 U.S.C. § 1292(a)(1), if it intended appellate courts to be mere rubber-stamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason." (at 1197)

An appellate court "may reverse findings of fact by a trial court where 'clearly erroneous.'" United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1947). Remand is not required where the record would permit the appellate

court to substitute its own findings of fact for those of the District Court. See National Ass'n of Letter Carriers v. Sombrotto, 449 F. 2d 915, 921 (2nd Cir., 1971). As previously discussed under Point I, the record before the District Court concerning plaintiff's abuse of the preliminary injunction consists entirely of affidavits and documentary evidence. The un rebutted facts include, inter alia:

- 1) plaintiff's repeated public disparagement of Smith employees during the pendency of the preliminary injunction, 2) plaintiff's submission of falsified business records during the pendency of the preliminary injunction, 3) plaintiff's objections to payment of service costs and plaintiff's improper deductions from amounts due Smith during the pendency of the preliminary injunction, 4) prolongation of the preliminary injunction period because of plaintiff's dilatory tactics in failing to proceed with discovery, and 5) plaintiff's failure to adhere to directions in the District Court's preliminary injunction order of May 1, 1975.

It is submitted that these unrebutted facts, some of which are admitted by plaintiff on the record, require that this Court reverse the District Court's order of January 15, 1976, refusing Smith's application to dissolve the preliminary injunction, and refusing any other relevant relief. Reasons for reversal are the District Court's clearly erroneous findings of fact, as contained in the Magistrate's Report adopted in the Memorandum and Order of the District Court, or the District Court's failure to apply appropriate principles of law and equity.

CONCLUSION

The order of the District Court dated January 15, 1976, should be reversed and the preliminary injunction dissolved.

Respectfully submitted,
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